

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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NOV - 8 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

GN Docket No. 93-252

In the matter of)
)
Implementation of Section 3(n))
and 332 of the Communications Act)
)
Regulatory Treatment of)
Mobile Services)

To: The Commission

COMMENTS OF TIME WARNER TELECOMMUNICATIONS

Time Warner Telecommunications ("TWT"), by its attorneys and pursuant to § 1.415 of the Commission's rules, hereby submits its comments on the Notice of Proposed Rule Making ("NPRM"), FCC 93-454 (released October 8, 1993), in the above-captioned proceeding.

I. INTRODUCTION

TWT is a division of Time Warner Entertainment Company, L.P., a Delaware limited partnership ultimately controlled by Time Warner Inc. ("Time Warner"). Time Warner is a world leader in the fields of media, information, and entertainment, notably magazine publishing, motion pictures, television series production, records, books and cable television. TWT participates with its cable television affiliates in conducting PCS trials pursuant to experimental licenses in New York City, NY, Columbus, OH, Cincinnati, OH and St. Petersburg, FL. TWT has also conducted PCS experiments and demonstrations in Washington, D.C. pursuant to special temporary authority. As one with extensive experience in the early experimentation of PCS, TWT is both directly interested

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in and specially qualified to advise the Commission regarding the matters under consideration in this docket. TWT limits its comments to two aspects of the NPRM having a direct impact on PCS: (1) the regulatory status of PCS providers, and (2) the nondiscriminatory availability of local exchange interconnection services and facilities to all PCS providers.

II. COMMERCIAL VERSUS PRIVATE REGULATORY STATUS

In Title VI, Section 2002(b) of the Omnibus Budget Reconciliation Act of 1934 (the "Budget Act"), Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 (1993), signed into law on August 10, 1993, Congress amended Sections 3(n) and 332 of the Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq. (1988). Among other things, the amendments call for a change in the regulatory classification of non-broadcast radio licensees. Historically, the Commission has grouped non-broadcast radio licensees into two broad categories, private and common carrier. Different regulatory requirements are applicable, depending on which type of radio license was used to provide a given communications service.¹ For example, private radio licensees are

¹Originally, common carriers obtained radio licenses for facilities used to provide communications services (e.g., paging, mobile telephone, etc.) to the public for hire, while private radio licensees used their facilities to provide for their own internal communications needs. Over the years, the Commission's regulatory policies regarding the use of private radio facilities by persons other than the licensee have gradually changed. First, the Commission determined that private radio facilities could properly be used to disseminate information to the licensee's customers. The Commission also allowed two otherwise qualified licensees to jointly share facilities on a cost-shared, non-profit basis. Later, the Commission determined that a private radio licensee could make excess capacity on its facilities available to a

generally exempt from state regulation and are not subject to the provisions of Title II of the Communications Act, while common carrier licensees are, to the extent their services are intrastate, subject to state regulatory jurisdiction and, to the extent interstate, subject to federal Title II regulatory jurisdiction.

In the Budget Act, Congress directed the Commission to develop a new regulatory system in which all mobile radio licensees, whether currently considered private or common carrier, will be classified as either "commercial mobile service" or "private mobile service" licensees. The Budget Act defines a "commercial mobile service" as one that is (1) provided for profit, and (2) makes "interconnected service" available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public." The Commission has thus sought comment on how PCS licensees should be treated under these new statutory provisions.

TWT agrees with the Commission's tentative conclusion "that no single regulatory classification should be applied to all PCS services." NPRM at ¶ 45. TWT agrees with the Commission's recognition that: "PCS ... potentially [may] provid[e] a diverse array of mobile services, which could include applications that are not [commercial services within the meaning of the Budget Act]. If PCS were to be defined exclusively as a commercial mobile service,

qualified third party user. Finally, in the past several years, the Commission has awarded private radio authorizations to entities whose primary purpose in obtaining the license is to provide communications services and facilities to unrelated third parties, e.g., SMR and private carrier paging systems.

we are concerned that this potential diversity of applications would be unnecessarily restricted." Id.

TWT submits that the best way to nurture new services and provide for the development of numerous and diverse applications is to resist any premature urge to pigeon hole PCS into a restrictive regulatory category. PCS is barely a nascent service. Many technological, economic, and business factors will bear on how PCS and the array of potential services it can provide will develop. TWT believes that the public interest would be best served by allowing these various forces to play themselves out in the marketplace, unhampered by futile attempts to predict the future, lest regulatory requirements artificially impede the rapid, flexible, and diverse development of PCS services.

Accordingly, TWT recommends an overall approach that presumes PCS carriers will be a private mobile service unless a specific determination is made to the contrary.² The specific determination of commercial mobile service status could come about in one of two ways: (1) the licensee itself may voluntarily elect commercial service status, or (2) the Commission may determine, based on actual operational experience, that a particular existing service is in fact commercial and reclassify it accordingly. This approach has the benefit of not prematurely and artificially limiting a

²TWT also recommends that the Commission make clear that a PCS licensee may lease bandwidth to a third party without regard to its regulatory status. This would allow a licensee to most efficiently use its spectrum assignment and would be consistent with Commission precedent. For example, in the context of certain private radio services, a licensee is permitted to lease excess capacity without being subject to common carrier regulations. See supra note 1.

future service based on a theoretical prediction of what it may become. Moreover, this approach provides freedom for PCS to develop in response to public needs, while preserving the Commission's ability to assure equal regulatory treatment of applications that actually evolve into commercial services.³

History has shown that this is the more sensible approach. Any effort to predict in advance how rapidly advancing technology will develop is futile. Such predictions inevitably lead to the imposition of inappropriate and misfitting regulation that inhibits the most efficient and publicly beneficial exploitation of technology. In contrast, the approach suggested by TWT creates an environment of freedom and flexibility, encouraging the full development of technology and services while still permitting a proper regulatory response to whatever situation actually emerges.

For these same reasons, TWT suggests that the Commission interpret the "functional equivalent" language contained in Section 332(d)(3) of the Budget Act in a manner that will support a broad definition of private mobile service. This section defines private mobile service as any mobile service "that is not a commercial mobile service or the functional equivalent of a commercial mobile

³Classification of PCS providers as private rather than commercial service providers will have significant impact on disparate regulatory treatment vis-a-vis commercial mobile service providers only to the extent that the Commission elects not to exercise its discretion to exempt the latter from Title II regulatory requirements. TWT urges the Commission to forbear from Title II regulation of commercial mobile service providers to the maximum extent possible.

service."⁴ Noting that this language and its legislative history leaves open alternative interpretations, the Commission sought comment on how mobile services should be classified under this definition. See NPRM at ¶ 29.

As discussed above, regulating PCS as a private mobile service will afford licensees with the freedom and flexibility to quickly adapt their services to better meet the demands of the marketplace. As such, even where a service meets the literal definition of a commercial mobile service, it is appropriate for such service to be classified as private if the service is not functionally equivalent. This result is entirely consistent with the notion of regulatory parity for like providers.⁵ To hold otherwise would impose regulatory constraints on a developing industry without any corresponding benefits. Sound public policy dictates that the Commission not raise form over substance, and inappropriately handicap new service providers.

In any event, the Commission should seek to avoid becoming mired in a stream of subjective, case-by-case evaluations of whether or not a particular service is the "functional equivalent"

⁴47 U.S.C. § 332(d)(3).

⁵The overall impact of adopting a broad definition of private mobile service would not be great. As the Commission acknowledged, "The practical effect of this interpretation would be to expand, to a limited degree, the potential number of mobile services that would be classified as private as opposed to commercial mobile services." NPRM at ¶ 29. (emphasis added.)

of a commercial mobile service.⁶ The recommendations offered herein by TWT will go a long way toward achieving this objective. By establishing a regulatory scheme that leans toward private mobile status, with respect to both functional equivalency and as a general proposition, PCS licensees will be less likely to seek redress in order to change their regulatory status. This will ensure the Commission is not overburdened with requests to evaluate such situations, and will help to create an environment conducive to the rapid development of PCS.

III. FAIR AND EQUAL PSTN INTERCONNECTION TREATMENT

The FCC "propose[s] that PCS providers should have a federally protected right to interconnection with LEC facilities regardless of whether they are classified as commercial or private mobile service providers, and that inconsistent state regulation should be prohibited." NPRM at ¶ 73. TWT strongly endorses and applauds this proposal. Regardless of the various potential uses of PCS technology, and without regard to whether such applications are to be considered commercial or private mobile service, the ability to achieve interconnectibility with users of PCS and other telecommunications services must be established. There will perhaps be some applications of PCS that do not require interconnection to the public switched telephone network ("PSTN"), but many applications will. In either case, there is no reason why such full and free access should be denied.

⁶In evaluating "functional equivalence," the Commission should give significant weight to the scope of the service in terms of geographic area, customer base, and other factors.

We may in the future achieve an environment in which switched local exchange communications services are ubiquitous, with many alternative providers of equal economic and technological clout. In such an environment, free market forces can be expected to achieve the desired public interest goals. Until that time, however, the Commission must deal with the reality that local exchange switching is still a bottleneck, and control of that bottleneck can inhibit the growth of new and useful telecommunications services.

TWT does not suggest that the Commission become directly involved in the details and micromanage each and every interconnection relationship. It should be adequate, at least initially, for the Commission to clearly and firmly establish an unfettered right on the part of PCS providers and/or their customers to whatever form of local exchange access that is beneficial to the public without being harmful to the PSTN.⁷ There is no basis for distinguishing between PCS providers and any other class of PSTN user, whether they be individual users, large PBX operators, cellular or other common carriers, etc. Moreover, there is no basis for distinguishing between commercial and private PCS

⁷The unfettered right to interconnection should not depend on the particular business form of the interconnection arrangement. In some cases, the PCS provider itself may contract for interconnection to be used in conjunction with its PCS services and facilities. In other situations, the PCS provider or a third party may contract on the PCS subscriber's behalf for interconnection services. Finally, the PCS subscriber may contract directly with the LEC for interconnection of its PCS services or facilities to the PSTN. The LEC should be obligated to fulfill all such reasonable requests for interconnection service.

providers insofar as interconnection rights are concerned. From the functional and cost standpoints, it will be entirely transparent to the LEC whether a particular communication through its switching facilities is part of a commercial service or a private service. Absent a compelling showing of a need to do so, LECs should not be permitted to discriminate in any way regarding interconnection services and facilities made available to commercial and private PCS providers as well as other mobile radio licensees.⁸

Consistent with this position is the notion that while PCS operators will compensate LECs for access to the PSTN in order to terminate connections, LECs should be required to compensate PCS operators for calls made by LEC customers terminating on PCS networks. This has been the traditional policy governing relationships between LECs, and the Commission has applied this policy of mutual compensation to mobile radio common carrier services as well.⁹ The underlying rationale of this policy (i.e., costs should be borne by those causing the costs) is not dependent

⁸TWT recognizes that the nature of the interconnection arrangement may have an impact on the determination whether a particular PCS service is private or commercial. Under the Budget Act amendments, one of the elements of the "commercial mobile service" definition is making "interconnected service" available to the public or substantial portion thereof. 47 U.S.C. § 332(d)(1). While this may be relevant to the Commission's regulatory classification of PCS providers, it should have no impact whatsoever on the LEC's provision of interconnection services and facilities. LECs should not discriminate in the provision of interconnection service on the basis of the regulatory status of the customer.

⁹See Cellular Interconnection Proceeding, Memorandum Opinion and Order, FCC 89-60 (released March 15, 1989) at ¶ 26.

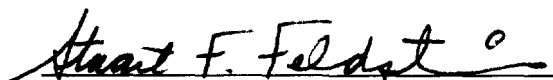
upon the status of the communications service providers, and should apply regardless of whether a PCS system is classified as private or commercial. TWT asks the Commission to make it clear that such reciprocity is a critical element of fair and equal interconnection treatment.

TWT also encourages the Commission to follow through on its proposal to preempt inconsistent state regulation of interconnection services. A consistent and uniform federal policy must be established if we are to create the atmosphere in which PCS will have the opportunity to evolve into services fully responsive to the growing and ever-changing telecommunications needs of the public. To the extent that states exercise any intrastate regulatory jurisdiction over PCS, they should be under a strong burden to show that such regulation is limited to matters within the state's exclusive intrastate jurisdiction and will not interfere with the federal goals and policies relating to PCS service.

Respectfully submitted,

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Dated: November 8, 1993/11234